Supreme Court, U.S.
FILED
DEC 13 2001
CLERK

No. 01-620

In The

Supreme Court of the United States

BUILDING INDUSTRY ASSOCIATION OF SUPERIOR CALIFORNIA, ET AL.,

Petitioners,

v.

GALE NORTON, ET AL.,

and

ENVIRONMENTAL DEFENSE CENTER, ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

NEIL LEVINE
Counsel of Record
EARTHJUSTICE
UNIVERSITY OF DENVER LAW SCHOOL
Forbes House
1714 Poplar Street
Denver, CO 80220
Telephone: (303) 871-6996

Attorney for Respondents Environmental Defense Center and Butte Environmental Council

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

I. Was the U.S. Fish and Wildlife Service's decision, under the Endangered Species Act, to place species of fairy shrimp on the list of endangered species a permissible exercise of Congress' Constitutional authority?

II. Did the U.S. Fish and Wildlife Service violate required procedures by not requesting additional public comment before listing the fairy shrimp based on receipt of a study that confirmed existing information about species distribution?

LIST OF PARTIES

The following are parties to this proceeding:

Petitioners: Building Industry Association of Superior California, Sacramento Chamber of Commerce & Marvin Oates

Respondents: Secretary of the Interior Gale Norton, Acting Director of U.S. Fish & Wildlife Service, Marshall Jones, Environmental Defense Center & Butte Environmental Council

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Environmental Defense Center and Butte Environmental Council have no parent companies and issue no corporate stock.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

LIST OF PARTIES ii

RULE 29.6 CORPORATE DISCLOSURE STATEMENT ii

TABLE OF AUTHORITIES v

INTRODUCTION 1

STATEMENT OF THE CASE 2

I. THE ENDANGERED SPECIES ACT 2

II. LISTING PROCESS 3

III. PROCEEDINGS BELOW 5

REASONS FOR NOT GRANTING REVIEW 6

I. THERE IS NO NEED TO REVIEW ANOTHER COMMERCE CLAUSE CHALLENGE TO THE ESA 6

A. PETITIONERS' CLAIM IS NOT RIPE 6

B. COURTS HAVE UNANIMOUSLY UPHELD ACTIONS UNDER THE ESA AGAINST COMMERCE CLAUSE CHALLENGES 9

C. UNDER SUPREME COURT STANDARDS, THE CHALLENGED LISTING DECISION IS A VALID EXERCISE OF CONGRESS' COMMERCE CLAUSE AUTHORITY 11

1. PETITIONERS OMIT A CRITICAL DECIDING FACT 12

2. PROTECTING THESE SPECIES UNDER THE ESA SUBSTANTIALLY AFFECTS INTERSTATE COMMERCE 13

TABLE OF CONTENTS – Continued

Page

D. ANOTHER SOURCE OF CONSTITUIONAL POWER EXISTS TO SUSTAIN THE CHALLENGED AGENCY ACTION..... 17

II. THERE IS NO DISPUTE BETWEEN CIRCUITS REGARDING WHAT CONSTITUTES ADEQUATE NOTICE AND COMMENT 18

CONCLUSION 22

TABLE OF AUTHORITIES

Page

CASES

Andrus v. Allard, 444 U.S. 51 (1979) 16

Babbitt v. Sweet Home Chapter of Communities of Greater Oregon, 515 U.S. 687 (1995) 2, 9, 16

Bennett v. Spear, 520 U.S. 154 (1997) 3, 9

California Coastal Commission v. Granite Rock, 480 U.S. 572 (1987) 15

City of Stoughton, Wisconsin v. EPA, 858 F.2d 747 (D.C. Cir. 1988) 20

Douglas v. Seacoast Prods., Inc., 431 U.S. 265 (1977) 16

Fort Wayne Books v. Indiana, 489 U.S. 46 (1989) 7

GDF Realty v. Norton, 2001 WL 1223519 (W.D. Tex. Aug. 30, 2001) 8, 9

Gibbs v. Babbitt, 214 F.3d 483 (4th Cir. 2000), *cert. denied*, 531 U.S. 1134 (2001) ..... *passim*

Hodel v. Indiana, 452 U.S. 314 (1981) 14

Hodel v. Virginia Surface Mining and Reclamation Ass'n, 452 U.S. 264 (1981) 7

Hodge v. Dalton, 107 F.3d 705 (9th Cir. 1997) 20

Idaho Farm Bureau v. Babbitt, 65 F.3d 1392 (9th Cir. 1995) 19, 20, 21

Members of City Council v. Taxpayers for Vincent, 466 U.S. 789 (1984) 7

Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172 (1999) 16

Missouri v. Holland, 252 U.S. 416 (1920) 16, 17

TABLE OF AUTHORITIES – Continued

Page

National Ass'n of Home Builders v. Babbitt, 130 F.3d 1041 (D.C. Cir. 1997), *cert. denied*, 524 U.S. 937 (1998) 8, 9, 10, 11

Ohio Forestry v. Sierra Club, 523 U.S. 726 (1998).. 6, 7, 8

Palila v. Hawaii Dep't of Land & Natural Resources, 471 F.Supp. 985 (D.Haw. 1979), *aff'd*, 639 F.2d 495 (9th Cir. 1981) 8, 9

Perez v. United States, 402 U.S. 146 (1971) 14

Rancho Viejo v. Norton, 2001 WL 1223502 (D.D.C. Aug. 20, 2001) 8, 9

Solite v. EPA, 952 F.2d 473 (D.C. Cir. 1991) 20

Texas v. United States, 523 U.S. 296 (1998) 8

TVA v. Hill, 437 U.S. 153 (1978). 9, 13

U.S. v. Lopez, 514 U.S. 549 (1995) ..... *passim*

U.S. v. Morrison, 527 U.S. 598 (2000) 10, 11, 12, 17

CONSTITUTION

U.S. Const. art. II, § 2, cl. 2 17

U.S. Const. art. VI, cl. 2 17

STATUTES AND REGULATIONS

ENDANGERED SPECIES ACT

16 U.S.C. § 1531(a)(4) 18

16 U.S.C. § 1531(a)(5) 13

16 U.S.C. § 1531(b) 2, 16, 18

16 U.S.C. § 1532(3) 16

TABLE OF AUTHORITIES – Continued

Page

16 U.S.C. § 1533(a)(1) 2

16 U.S.C. § 1533(b)(1)(A) 2, 16

16 U.S.C. § 1533(b)(3) 2

16 U.S.C. § 1533(b)(4) 2

16 U.S.C. § 1533(b)(6) 2

16 U.S.C. § 1533(b)(6)(A) 4

16 U.S.C. § 1535(a) 16

16 U.S.C. § 1536(a)(2) 3

16 U.S.C. § 1538(a)(1)(B) 2

16 U.S.C. § 1538(a)(1)(G) 2

16 U.S.C. § 1538(a)(2)(A) 13

16 U.S.C. § 1538(a)(2)(C) 13

16 U.S.C. § 1538(a)(2)(D) 13

16 U.S.C. § 1539 3

50 C.F.R. § 17.31 2

56 Fed. Reg. 42968 (August 30, 1991) 3

57 Fed. Reg. 19856 (May 8, 1992) 3, 4, 13, 19

57 Fed. Reg. 36380 (August 13, 1992) 4, 19

59 Fed. Reg. 48136 (September 19, 1994) 4, 5, 13, 19

65 Fed. Reg. 18026 (April 4, 2000) 12, 21

TABLE OF AUTHORITIES – Continued

Page

OTHER STATUTES

16 U.S.C. §§ 668-668d 16
16 U.S.C. §§ 702-12 16
16 U.S.C. §§ 1361-1421h 16
16 U.S.C. § 1604 6
56 Stat. 1354, T.S. No. 981 18

INTRODUCTION

Petitioners offer no reason for this Court to review the lower court's decision sustaining the listing of species under the Endangered Species Act (ESA) as a legitimate exercise of Congress' Commerce Clause authority. As an initial matter, Petitioners' Commerce Clause claim is not ripe for review because they have challenged the placement of species on the endangered species list, and not a site-specific application of the listing. There is no need for the Supreme Court to consider the Commerce Clause issue since the lower courts have unanimously upheld the ESA and its implementation against this type of constitutional challenge and have adhered conscientiously to Supreme Court jurisprudence in doing so. In any case, Petitioners' constitutional claim is undermined by the fact that the species involved do not occur only within a single state – the species reside in both California and Oregon. The Petition for a Writ of Certiorari should therefore be denied.

There is also no reason to review Petitioners' claim that the U.S. Fish and Wildlife Service (FWS) should have re-opened the comment period based on receipt of one scientific study. In keeping with established precedent, the D.C. Circuit ruled that additional notice and comment was not necessary because the study merely confirmed existing information about the species' population distribution. Contrary to Petitioners' claim, the ruling does not create a conflict between the D.C. and Ninth Circuits. Indeed, the two courts are applying the same legal standards. This unexceptional ruling does not warrant Supreme Court review.

STATEMENT OF THE CASE

I. THE ENDANGERED SPECIES ACT

The ESA is Congress' response to the growing concerns over the extinction of many animal and plant species throughout the United States. It "provide[s] a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved." 16 U.S.C. § 1531(b). To achieve its objectives, the ESA directs FWS to determine which species of plants and animals warrant ESA regulatory protection and to place those imperiled species on the list of threatened and endangered species. *Id.* § 1533(a). Two of the statutory factors for ESA listing are the present or threatened destruction, modification or curtailment of habitat or range and the inadequacy of existing regulatory mechanisms. *Id.* § 1533(a)(1). FWS must make listing decisions "solely on the basis of the best scientific and commercial data available" and in conformance with a series of statutory deadlines. *Id.* § 1533(b)(1)(A); § 1533(b)(3) & (6). The ESA requires FWS to notify the public and request public comment on a proposed listing rule. *Id.* § 1533(b)(4).

Once a species is placed on the list of threatened and endangered species, the regulatory framework of the ESA may be applied to specific activities and projects. Under section 9, Congress made it unlawful for any person to "take" a species, which prohibits activities significantly modifying a species' habitat, as well as the killing, wounding, trapping, collecting, capturing, or trapping of a listed species. 16 U.S.C. § 1538(a)(1)(B) & (G); 50 C.F.R. § 17.31 (extending "take" prohibition to "threatened" species); *Babbitt v. Sweet Home Chapter of Communities of*

Greater Oregon, 515 U.S. 687 (1995) (upholding ESA definitions of "take" and "harm" as applied on public and private lands). To temper this prohibition, in section 10, Congress authorized FWS to issue permits that allow for the "incidental" taking of listed species for specific activities. 16 U.S.C. § 1539. Further, in ESA section 7, Congress prohibited federal agencies from jeopardizing the continued existence of any endangered or threatened species. 16 U.S.C. § 1536(a)(2). To avoid jeopardy, agencies must "consult" with FWS before issuing permits and taking actions and receive FWS approval for their site-specific projects. *Id.*; *Bennett v. Spear*, 520 U.S. 154 (1997) (describing section 7 process).

II. LISTING PROCESS

In 1991, FWS determined that listing the fairy shrimp "may be warranted" because the species' distribution within the historic range, southern Oregon through California, was extremely limited. 56 Fed. Reg. 42968-69 (August 30, 1991). After further reviewing the status of the species, FWS published a proposed listing rule. 57 Fed. Reg. 19856, 19861 (May 8, 1992). In the listing proposal, FWS stated that the fairy shrimp are "extremely sporadic in their distribution since they may inhabit only one or a few pools in otherwise more widespread vernal pool complexes" and the "distribution of vernal pools is highly discontinuous." 57 Fed. Reg. at 19856.[1] The

---

[1] Vernal pools are freshwater wetlands. They typically form in shallow depressions that fill with rainwater and snowmelt run-off. The pools are frequently clustered into assemblages known as vernal pool complexes. Vernal pool areas provide

proposed rule identified urban development, agricultural activities, water developments, and flood control activities as the causes of the species' decline. *Id.* at 19858-60. FWS also found that existing regulatory mechanisms, including state and local laws as well as other federal laws and regulations, failed to adequately protect these species. *Id.* at 19860.

Public comment on the 1992 listing proposal exceeded that required under the ESA. FWS held an initial 60-day comment period on the proposed rule and later extended public comment for an additional 60 days at the public's request. 57 Fed. Reg. 19856; 57 Fed. Reg. 36380. FWS held multiple public hearings. 57 Fed. Reg. 19856. The Simovich study, the object of Petitioners' notice and comment procedural challenge, was submitted during the comment period on the proposed rule. Pet. App. B-7. This study along a proposed 200-mile pipeline in California confirmed existing information about species distribution. Pet. App. C-14.

On September 19, 1994, FWS listed the fairy shrimp. 59 Fed. Reg. 48136.[2] Once again, threats to habitat and the inadequacy of local, state, and federal regulations were the justifications for ESA listing. Pet. App. B-3, C-6. In

---

important wintering and feeding grounds for migratory waterfowl along the Pacific flyway and the only habitat for the listed shrimp species and several native plant species. *See generally*, 59 Fed. Reg. 48136, 48137.

[2] Contrary to Petitioners' unsupported claim, FWS never "extended the date for a final decision to collect additional data." Pet. 22-23. Rather, FWS violated the ESA deadline for a final listing without reason (16 U.S.C. § 1533(b)(6)(A)), prompting a lawsuit to secure a listing decision. Pet. App. C-5.

addition, placing the species on the endangered species list was warranted because the distribution of the species within its known range was limited. 59 Fed. Reg. at 48136 ("sporadic in their distribution").

III. PROCEEDINGS BELOW

Petitioners filed suit in 1995 challenging FWS's decision to place fairy shrimp on the list of threatened and endangered species. Both the District Court and D.C. Circuit rejected each one of Petitioners' thirteen claims challenging the listing. Relevant to these proceedings, on July 25, 1997, District Court Judge Paul Friedman rejected Petitioners' Commerce Clause challenge to the listing. Pet. App. C-22-25. The court applied the Supreme Court framework articulated in *U.S. v. Lopez*, 514 U.S. 549 (1995) and found that the ESA as a whole and the listing of the fairy shrimp species in particular were actions within Congress' Commerce Clause authority. *Id.* at C-24. Judge Friedman also determined that additional public comment on the Simovich study was not necessary because "the Final Rule does not turn on the Simovich study result." Pet. App. C-14.

Writing for the D.C. Circuit, Judge Silberman affirmed the district court's ruling on May 8, 2001. The court expressed no opinion on the Commerce Clause claim, but simply acknowledged that Petitioners raised the issue "only to preserve the possibility of en banc review." Pet. App. B-10, n.8. Judge Silberman also concluded that the final listing rule was the logical outgrowth of the proposal rule and that the Simovich study did not warrant re-opening the public comment period.

Pet. App. B-8 ("the Simovich study, while the best available, only confirmed the findings delineated in the proposal").

On July 13, 2001, without an opinion, the D.C. Circuit denied Petitioners' request for *en banc* review on both claims and no judge requested a vote.

REASONS FOR NOT GRANTING REVIEW

I. THERE IS NO NEED TO REVIEW ANOTHER COMMERCE CLAUSE CHALLENGE TO THE ESA

A. PETITIONERS' CLAIM IS NOT RIPE

Petitioners' Commerce Clause challenge to placing the fairy shrimp on the list of endangered species is not ripe for judicial review. As this Court has held, challenges to an agency's programmatic decisions are not ripe until there is a site-specific action. *Ohio Forestry v. Sierra Club*, 523 U.S. 726, 733 (1998). In *Ohio Forestry*, the court held that a challenge to a Forest Service Land and Resource Management Plan that governed management of an entire national forest was not ripe. Mere adoption of the Plan, as contemplated under the National Forest Management Act, 16 U.S.C. § 1604, did not cause significant practical harm to plaintiff's interest, even if the Plan established where logging could occur and set the parameters for future logging activities. *Id.* at 729, 733. Under the Plan, the Forest Service would have to undertake multiple future actions before logging could begin. *Id.* at 734. Accordingly, the Court ruled that plaintiff's claim would not be ripe until the Forest Service approved a

site-specific action, at which time the harm would be "more imminent and certain," the agency could address plaintiff's specific concerns, and the court would benefit from reviewing a concrete action as opposed to predicted consequences. *Id.* at 734-36.

Moreover, the general rule is that a constitutional challenge is not ripe for review until the government actually *applies* the law to a claimant. *Fort Wayne Books v. Indiana*, 489 U.S. 46, 60 (1989) (court ruling that constitutional claims would only be ripe should statutory provisions be enforced against petitioners); *Hodel v. Virginia Surface Mining and Reclamation Ass'n*, 452 U.S. 264, 297 (1981) (court noting that before constitutional claims become ripe, the challenged statutory provisions had to be applied against petitioners and petitioners had to avail themselves to administrative remedies); *see also Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 798 (1984) (reaffirming rule that "constitutional adjudication requires review of the application of a statute to the conduct of the party before the court"). Thus, for Petitioners' Commerce Clause challenge to be ripe, they must identify some site-specific application of the challenged listing decision to their activities.

Petitioners' challenge to FWS's decision to place the fairy shrimp on the list of endangered species is analogous to adoption of the Management Plan in *Ohio Forestry*. Although listing makes the ESA's conservation prescriptions available, it is not until actual implementation of the ESA's provisions to a site-specific project, like implementation of the Forest Management Plan, that a challenge becomes ripe. FWS has not applied the ESA to

Petitioners by approving or preventing a site-specific project that affects the listed fairy shrimp. Petitioners have not sought an ESA section 10 permit or been subject to an ESA section 9 enforcement action. As a result, at this point, Petitioners' constitutional claim is not concrete, but instead "rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." *Texas v. United States*, 523 U.S. 296, 300 (1998). Whether the listing decision will be applied to Petitioners' economic activities, and thus whether judicial intervention will ever be required, is speculative.

Accordingly, the proper course for Petitioners is to await a site-specific application of the listing rule to raise their Commerce Clause argument. *See Ohio Forestry*, 523 U.S. at 733. Petitioners will have ample opportunity to raise their constitutional challenge in the future in the context of a specific ESA section 10 permit application or ESA section 7 consultation. Indeed, in every prior challenge to the ESA under the Commerce Clause, the implementation of a listing decision was at issue, and not the mere listing of a species.[3]

---

[3] *Gibbs v. Babbitt*, 214 F.3d 483, 493-94 (4th Cir. 2000), *cert. denied*, 531 U.S. 1134 (2001); *National Ass'n of Home Builders v. Babbitt*, 130 F.3d 1041 (D.C. Cir. 1997), *cert. denied*, 524 U.S. 937 (1998); *Palila v. Hawaii Dep't of Land & Natural Resources*, 471 F.Supp. 985 (D.Haw. 1979), *aff'd*, 639 F.2d 495 (9th Cir. 1981); *Rancho Viejo v. Norton*, 2001 WL 1223502 (D.D.C. Aug. 20, 2001); *GDF Realty v. Norton*, 2001 WL 1223519 (W.D. Tex. Aug. 30, 2001).

B. COURTS HAVE UNANIMOUSLY UPHELD ACTIONS UNDER THE ESA AGAINST COMMERCE CLAUSE CHALLENGES

There is no split between the circuits or lower courts necessitating this Court to establish a rule of law. *Every* federal court that has addressed the constitutionality of the ESA and its implementation has agreed that the Commerce Clause authorizes such federal protection of wildlife, even for species that happen to reside in only one state. *Gibbs v. Babbitt*, 214 F.3d 483, 493-94 (4th Cir. 2000), *cert. denied*, 531 U.S. 1134 (2001) (upholding ESA reintroduction program for red wolves); *National Ass'n of Home Builders v. Babbitt*, 130 F.3d 1041 (D.C. Cir. 1997), *cert. denied*, 524 U.S. 937 (1998) (upholding application of section 9 to proposed hospital to protect Delhi Sands flower-loving fly); *Palila v. Hawaii Dep't of Land & Natural Resources*, 471 F.Supp. 985 (D.Haw. 1979), *aff'd*, 639 F.2d 495 (9th Cir. 1981) (affirming application of ESA section 9 to livestock grazing activities to protect endangered Hawaiian birds); *GDF Realty v. Norton*, 2001 WL 1223519 (W.D. Tex. Aug. 30, 2001) (upholding section 9 regulation application to commercial development project to conserve Texas insects); *Rancho Viejo v. Norton*, 2001 WL 1223502 (D.D.C. Aug. 20, 2001) (affirming application of section 7 jeopardy standard to residential development for protection of arroyo toads). Moreover, the Supreme Court has considered the ESA and has never questioned the constitutionality of the statute itself or its implementation. *Bennett*, 520 U.S. 154; *Sweet Home*, 515 U.S. 687; *TVA v. Hill*, 437 U.S. 153 (1978). Accordingly, there is no conflict that threatens the consistency of federal law.

Petitioners' present constitutional claim is identical to the prior failed challenges under the Commerce Clause to the ESA. In *Gibbs*, Chief Judge Wilkinson of the Fourth Circuit ruled that application of an ESA reintroduction program for North Carolina's red wolves, including a prohibition against certain agricultural activities and shootings, was within Congress' Commerce Clause authority. *Gibbs*, 214 F.3d at 493-95. In *Home Builders*, the D.C. Circuit rejected the Commerce Clause argument that ESA section 9 could not be applied to protect California's Delhi Sand flower-loving fly from a proposed hospital. *Home Builders*, 130 F.3d at 1057. Both courts rejected the exact arguments Petitioners make in this case. The present case is not distinguishable in any relevant manner from these cases.[4] Notably, in finding Commerce Clause authority, the Fourth and D.C. Circuits adhered conscientiously to the rules laid down by this Court in *U.S. v. Morrison* and its predecessor *U.S. v. Lopez*. This Court denied certiorari in both cases. *Gibbs*, 531 U.S. 1134 (2001); *Home Builders*, 524 U.S. 937 (1998).[5]

In short, unless and until either some genuine conflict arises in the lower courts regarding the application of this Court's Commerce Clause decisions to the ESA or

---

[4] Indeed, Petitioners recognized in briefing to the D.C. Circuit that the *Home Builders* decision controls and did not try to distinguish the *Home Builders* case. Pet. App. B-10, n.8.

[5] Petitioners mistakenly assert that the decision in *Home Builders* "was patently inconsistent with this Court's rationale in *Lopez*." Pet. 13. If that were so, this Court would have granted certiorari in *Home Builders*.

some real reason exists to believe that this Court's precedents are not being conscientiously followed, there is no need for the Court to address this Commerce Clause issue. Petitioners cannot simply re-litigate the *Home Builders* case. Yet, in their petition, Petitioners focus almost entirely on the D.C. Circuit's ruling in *Home Builders* and argue certiorari in this case is appropriate because *Home Builders* is an "unsupportable decision" that was made "in error and conflicts with the decisions of this Court" (Pet. 11), and which lacks "any cogent rationale" (Pet. 19) and sets a "dubious precedent." Pet. 22. However, this Court already had the opportunity to consider *Home Builders*, but denied the petition for a writ of certiorari. Petitioners cannot litigate a case already fully decided.[6]

C. UNDER SUPREME COURT STANDARDS, THE CHALLENGED LISTING DECISION IS A VALID EXERCISE OF CONGRESS' COMMERCE CLAUSE AUTHORITY

Under this Court's rulings in *U.S. v. Morrison*, 527 U.S. 598 (2000) and *U.S. v. Lopez*, 514 U.S. 549 (1995), the regulation of intrastate activities that substantially affect commerce fall within Congress' Commerce Clause authority. In *Morrison*, the Court emphasized that in reviewing an intrastate activity, a key question is whether

---

[6] Petitioners state that the lower court deferred to the decision in *Home Builders*. Pet. 11. This characterization is wrong, if not disingenuous. At Petitioners' request, the D.C. Circuit did not rule on the Commerce Clause claim or defer to *Home Builders*. Pet. App. B-10, n.8.

the activity being regulated is "economic activity." *Morrison*, 529 U.S. at 610, 613. If not, a non-economic intrastate activity could still be regulated under the Commerce Clause if, in the aggregate, the activity substantially impacts interstate commerce. *Id.* at 613. In *Morrison*, the Court ruled that a statute providing civil remedies for gender-motivated crimes exceeded Congress' Commerce Clause authority. As in *Lopez*, where the Court overturned a statute criminalizing the possession of guns in schools, the *Morrison* Court ruled that criminal activity is not economic in nature, did not impact interstate commerce, and was traditionally an activity within a state's police powers. *Morrison*, 529 U.S. at 618.

1. PETITIONERS OMIT A CRITICAL DECIDING FACT

Fairy shrimp are not limited to one state. The fundamental premise of Petitioners' Commerce Clause challenge to the listing is that fairy shrimp are a "wholly intrastate" (Pet. 2) species that are "limited to the California Central Valley." Pet. 11. Inexcusably, Petitioners ignore the fact that fairy shrimp also live in the State of Oregon. They are not an intrastate species. Populations of fairy shrimp occur in the Agate Desert in Southwestern Oregon, on both private and public lands. 65 Fed. Reg. 18026, 18028 (April 4, 2000) ("discovery of a new population of vernal pool fairy shrimp in Jackson County, Oregon").[7]

---

[7] *See also* Evans & Associates, Agate Desert Vernal Pool Surveys (March 19, 2001); Borgias, et al., Fairy Shrimp Survey on Public Lands on the Agate Desert Landform, Jackson County, Oregon (July 19, 1999).

As set forth in the final listing rule, the habitat range of fairy shrimp "extends from Southern Oregon into Northern Baja, Mexico." 59 Fed. Reg. at 48136; 57 Fed. Reg. at 19857 (same statement in 1992 proposed rule). As a result, biologists move between states to study fairy shrimp, and economic activities in multiple states affect these species. Since Petitioners' Commerce Clause claim is dependent on the occurrence of fairy shrimp in only California, the presence of the species in another state undermines the argument.

2. PROTECTING THESE SPECIES UNDER THE ESA SUBSTANTIALLY AFFECTS INTERSTATE COMMERCE

Even if fairy shrimp only occurred within a single state, which they do not, placing these species on the endangered species list is a valid exercise of Congress' Commerce Clause authority. First, the ESA is a Congressional program for endangered species that substantially affects the economy. In the ESA, Congress recognized that imperiled species of wildlife constitute natural resources "of esthetic, ecological, educational, historical, recreational, and scientific value" to the nation. 16 U.S.C. § 1531(a)(5). The statute prohibits importing, exporting or selling listed species in interstate commerce. *Id.* § 1538(a)(2)(A), (C) & (D). Moreover, as this Court ruled, Congress intended the ESA to preserve "potential resources" of "incalculable" value. *TVA*, 437 U.S. at 178 (internal quotations and citation omitted). In short, Congress has constitutional authority to pass legislation to conserve endangered species. *Gibbs*, 214 F.3d at 497.

When a statute as a whole is constitutionally valid, like the ESA, this Court routinely rejects focusing on an individual instance of an intrastate activity. *Lopez*, 514 U.S. at 558 ("Where a general regulatory statute bears a substantial relation to commerce, the de minimis character of individual instances arising under that statute is of no consequence"); *see also Hodel v. Indiana*, 452 U.S. 314, 329, n.17 (1981); *Perez v. United States*, 402 U.S. 146, 154 (1971). A court's review cannot be excessively narrow in this manner. *Id.* A wholly intrastate action with no interstate commerce connection is still constitutional, therefore, if it is part of a general larger regulatory scheme that substantially affects the economy.

Petitioners argue, however, that although the ESA as a whole is constitutionally valid, protecting certain species that happen to reside in only one state is not. Not only is this type of constitutional challenge misplaced, as this Court has held, but it is illogical. The district court in this case explained:

> According to plaintiffs, if a species is abundant and scattered plentifully across state lines, Congress is fully empowered under the Commerce Clause to protect it. But when that same species becomes more scarce and its population is reduced to a single state, Congress' hands are suddenly tied. The court declines to read *Lopez* as hamstringing Congress in such an irrational fashion in a regulatory area of such important economic, scientific and environmental dimensions.

Pet. App. C-25; *see also Gibbs*, 214 F.3d at 498 ("It would be perverse indeed if a species nearing extinction were found to be beyond Congress' power to protect while

abundant species were subject to full regulatory power"). Since Congress has the power to enact a statutory scheme for the conservation of endangered species, the protection of endangered species that are restricted to one state is not an unconstitutional federal action.

Second, the relationship between fairy shrimp and substantial impacts to interstate commerce is direct. The evidence in the record demonstrates that scientific research of fairy shrimp and their wetland habitat has generated numerous scientific studies and reports, the buying and selling of the species specimens, and the travel of scientists from other states to study and attend conferences on the species. Pet. App. C-23, n.23. In addition, Petitioners include a Chamber of Commerce from the City of Sacramento and a trade association dedicated to building homes in California's Central Valley. It is Petitioners' development activities, along with the conversion of wetlands to agricultural fields, that FWS determined adversely impacts these species. 59 Fed. Reg. at 48136. Since these economic activities have a substantial impact on interstate commerce within the meaning of *Morrison* and *Lopez*, Petitioners' Commerce Clause challenge does not warrant further review. *See Gibbs*, 214 F.3d at 495.

Without elaboration or analysis, Petitioners claim that listing the fairy shrimp intrudes upon an area of traditional state concern – land use. Pet. 17. FWS, however, is not engaging in regulating land use, but rather protecting wildlife by placing species on the endangered species list. *See California Coastal Commission v. Granite Rock*, 480 U.S. 572, 587 (1987). The federal government has a long history in the area of wildlife law. *See, e.g.*, 16

U.S.C. §§ 702-12 (Migratory Bird Treaty Act of 1918); 16 U.S.C. §§ 668-668d (Bald Eagle Protection Act of 1940); 16 U.S.C. §§ 1361-1421h (Marine Mammal Protection Act of 1972). This Court's recognition of the federal role in wildlife conservation began with *Missouri v. Holland*, 252 U.S. 416 (1920) and has never wavered. *See, e.g., Andrus v. Allard*, 444 U.S. 51, 63 n.19 (1979) (recognizing commerce power to protect migratory wildlife); *Douglas v. Seacoast Prods. Inc.*, 431 U.S. 265, 281-82 (1977) (federal regulation of fishing in state waters). States and the federal government may share regulatory responsibilities in this domain. *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 204 (1999) (States' role "in regulating wildlife and natural resources" . . . "is shared with the Federal Government when the Federal Government exercises one of its enumerated constitutional powers").[8] Moreover, it is well established that "Congress can regulate even private land use for environmental and wildlife conservation." *Gibbs*, 214 F.3d at 500; *see also Sweet Home*, 515 U.S.

---

[8] States play an integral role in regulating wildlife and the ESA respects that role. 16 U.S.C. § 1533(b)(1)(A) (upon determining whether a species is endangered, agency must consider "those efforts, if any, being made by any State . . . to protect such species"); *id.* § 1535(a) (federal agencies administering the ESA "shall cooperate to the maximum extent practicable with the States"); *id.* §§ 1531(b), 1532(3) (ESA's overriding purpose to recover imperiled wildlife species so that federal protections may be terminated and management of such species may revert to the States). Nonetheless, in the case of the fairy shrimp, FWS determined that ESA protection is necessary because local and state regulations have inadequately protected the species and its habitat. Pet. App. B-3, C-6.

at 692 (upholding ESA's section 9 "take" prohibition on both public and private lands). Accordingly, unlike the statutes struck down in *Lopez* and *Morrison*, which involved issues that were traditionally a local concern (crime), placing the fairy shrimp on the endangered species list, like the protection of other species on the verge of extinction, "does not plow thoroughly new ground" or "represent a sharp break with the long-standing pattern" of federal regulation. *See Lopez*, 514 U.S. at 563.

D. ANOTHER SOURCE OF CONSTITUIONAL POWER EXISTS TO SUSTAIN THE CHALLENGED AGENCY ACTION

In addition to being fully supported by the Commerce Clause, the challenged listing decision is valid as a necessary and proper measure to carry into effect the federal treaty power. *See* U.S. Const. art. VI, cl. 2; *id.* art. II, § 2, cl. 2. Although Petitioners did not address the treaty power, this source of authority provides an alternative constitutional basis for the challenged listing decision. This Court has recognized the treaty power as a basis for federal wildlife regulation on both public and private lands since *Missouri v. Holland*, where it sustained the Migratory Bird Treaty Act against a challenge virtually identical to that raised by the Petitioners here. *Missouri*, 252 U.S. at 433.

As with the Migratory Bird Treaty Act, the ESA implements international treaty obligations. In the ESA, Congress found that "the United States has pledged itself as a sovereign state in the international community to

conserve to the extent practicable the various species of fish or wildlife and plants facing extinction." 16 U.S.C. § 1531(a)(4). Congress identified several applicable treaties in section 2(a)(4) of the ESA. *Id.* (listing treaties). One of the treaties, the 1940 Convention on Nature Protection and Wildlife Preservation in the Western Hemisphere, promises protection of "all species and genera of . . . native flora and fauna . . . in sufficient numbers and over areas extensive enough to assure them from becoming extinct through any agency within man's control." 56 Stat. 1354, 1356, T.S. No. 981 (effective May 1, 1942). Congress enacted the ESA "to achieve the purposes" of these treaties. 16 U.S.C. § 1531(b). Accordingly, placing the fairy shrimp on the list of endangered species is constitutionally valid for this reason as well.

II. THERE IS NO DISPUTE BETWEEN CIRCUITS REGARDING WHAT CONSTITUTES ADEQUATE NOTICE AND COMMENT

Petitioners contend that every time an agency receives a study during an administrative process that confirms existing information, the agency must notice a new comment period and request additional public input. In this case, Petitioners believe FWS should have requested additional public comment on the Simovich study, which was submitted during the comment period.

Judge Silberman found Petitioners' complaints about the Simovich study unremarkable and held the study did not warrant re-opening the public comment period. This study of a proposed 200-mile pipeline through California

confirmed existing information about the species' limited distribution within their range.[9] The Simovich study was available to Petitioners, as well as the rest of the public, two years before the final rule was published. Judge Silberman held that the final listing rule was the logical outgrowth of the proposed rule and that the Simovich study did not change the listing decision to the detriment of Petitioners' interest;[10] rather, the study merely provided "better support than was previously available" for the listing decision. Pet. App. B-8. Accordingly, there was no need for FWS to request additional comment.

There is no legal conflict between Judge Silberman's decision and the Ninth Circuit's decision in *Idaho Farm Bureau v. Babbitt*, 65 F.3d 1392 (9th Cir. 1995). Petitioners'

---

[9] FWS repeatedly recognized, throughout the listing process, that the distribution of the species was limited. In the 1992 listing proposal, FWS stated that fairy shrimp are "extremely sporadic in their distribution since they may inhabit only one or a few pools in otherwise more widespread vernal pool complexes." 57 Fed. Reg. at 19856 ("distribution of vernal pools is highly discontinuous"). In re-opening the comment period, FWS maintained that fairy shrimp "are sporadic in their distribution." 57 Fed. Reg. at 36380. In the final listing, citing to the Simovich study as well as other sources, FWS reiterated that the species "are sporadic in their distribution, often inhabiting only one or a few pools in otherwise more widespread vernal pool complexes." 59 Fed. Reg. at 48136.

[10] In both the proposal and final rule, FWS maintained that listing was necessary primarily due to threats to habitat and the inadequacy of "existing regulatory mechanisms." *Compare* 57 Fed. Reg. at 19856 with 59 Fed. Reg. at 48136; 57 Fed. Reg. at 19860 with 59 Fed. Reg. at 48147-49.

claim that a conflict exists is belied by the Ninth Circuit's reliance, in *Idaho Farm Bureau*, on the same cases and standards Judge Silberman relied upon. Both courts cited to the ruling in *Solite Corp.*, which held that "an agency may use supplementary data unavailable during the notice and comment period that expands on and confirms information in the proposed rulemaking and addresses alleged deficiencies in the pre-existing data so long as no prejudice is shown." *Solite v. EPA*, 952 F.2d 473, 484 (D.C. Cir. 1991). As both the D.C. and Ninth Circuits have recognized, there must be some finality to the administrative process. *City of Stoughton, Wisconsin v. EPA*, 858 F.2d 747, 753 (D.C. Cir. 1988) ("The statutory requirement of notice and the opportunity for comment on a proposed rule does not automatically generate a new opportunity for comment every time the Agency reacts to the comments"); *Hodge v. Dalton*, 107 F.3d 705, 712 (9th Cir. 1997). In short, the rule of law applied by Judge Silberman and the Ninth Circuit in *Idaho Farm Bureau* was the same. *See also* Pet. App. C-12, n.16 (district court applied same standard).

The decisions in the two cases turned on the specific facts and studies involved. In *Idaho Farm Bureau*, plaintiffs challenged a final rule listing the Bruneau hotsprings snail under the ESA. Plaintiffs argued that FWS failed to provide adequate notice and comment on a U.S. Geological Survey (USGS) report, which detailed the cause of reduced water levels that led to the species' decline. *Idaho Farm Bureau*, 65 F.3d at 1401. Prior to the final listing decision and receipt of the USGS report, there had been no supporting information on the "cause of declining water levels." *Id.* at 1402-03. The court held that the USGS

report "did not merely supplement or confirm existing data," but provided the only information addressing the cause of the decline in spring flows. *Id.* at 1403. The court also noted that the USGS report was not available to the public because it was in draft form at the time of the listing and contained calculation errors. *Id.*

The Simovich study exhibits none of the characteristics that justified additional notice and comment on the USGS report in *Idaho Farm Bureau*. First, it provided no new information about population distribution or any other factor that supported listing. The Simovich study merely confirmed previously known information. Moreover, the accuracy of the Simovich study has never been questioned and there are no errors in the data.[11] The Simovich study was in final form and available to the public for two years prior to listing. Because the Simovich study, unlike the USGS report, did not warrant additional notice and comment, there is absolutely nothing unique in the D.C. Circuit's decision that merits consideration.

---

[11] Notwithstanding Petitioners' self-serving, yet unsubstantiated, claim that the Simovich study was "inadequate" (Pet. 22), every expert in the field agreed with its findings and recognized that "[t]his project is the most extensive and well-documented professional study of California's vernal pool invertebrates ever to be attempted." *See* Pet. App. C-14. The location of the study was randomly selected, with no regard to fairy shrimp, in 1960 by Pacific Gas & Electric for the purpose of constructing a pipeline through California's Central Valley. FWS also rejected Petitioners' "criticisms" of the Simovich study as presented in an ESA petition to de-list the fairy shrimp. 65 Fed. Reg. at 18027.

CONCLUSION

Petitioners present no legitimate reason for this Court to review another decision upholding the authority of Congress, and FWS, under the Commerce Clause to protect threatened and endangered species under the ESA. In addition, Judge Silberman's ruling on notice and comment did not break with established precedent and does not warrant Supreme Court review. The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

NEIL LEVINE
EARTHJUSTICE
UNIVERSITY OF DENVER LAW SCHOOL
Forbes House
1714 Poplar Street
Denver, Colorado 80220
(303) 871-6996

Attorney for Respondents
Environmental Defense Center
and Butte Environmental Council

December 13, 2001